

ISSUE BRIEF

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The FOCUS Act Hearing: Unpersuasive Criticisms and Tacit Admissions

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Thankfully, the law sometimes reflects common sense. Here's an example: Innocent people ordinarily do not remain silent when accused of having committed a crime or some other misconduct. As the result, it is reasonable to infer that such an accusation is true if a person does not deny it. In the law, that sensible proposition is embodied in the doctrine of "Tacit Admissions." The doctrine works as follows: If someone accuses you of a crime or unethical conduct and you don't deny it, a jury can infer that you committed what you are alleged to have done.

Keep that proposition in mind for a minute.

On Tuesday, May 8 the Subcommittee on Fisheries, Wildlife, Oceans and Consular Affairs of the House Committee on Natural Resources held a hearing on two bills

that would amend the Lacey Act. One bill, the Freedom from Over-Criminalization and Unjust Seizures Act of 2012 (FOCUS Act), H.R. 4171, would amend the Lacey Act by decriminalizing it. (There is an identical Senate bill, S. 2062.) At bottom, the FOCUS Act would make the Lacey Act enforceable only through administrative or civil process.

The Heritage Foundation has made the point on several occasions that the criminal provisions of the Lacey Act are unreasonable because they require an American, on pain of imprisonment, to know the criminal and civil laws of every foreign country, regardless of their number (Indonesia has hundreds) and regardless of their language (Brazil's forestry laws are written in Portuguese).¹ It may be necessary to presume that every person knows the laws of this nation, but it is utterly unreasonable to apply that principle—which is less a principle and more a ukase—to every law of every foreign country.

Numerous witnesses testified at the hearing,² and they offered different views. Senator Rand Paul (R-KY)³ and Representative Paul Broun (R-GA)⁴ criticized the Lacey Act for the reason noted above. Other witnesses—for example, Reid Rubenstein of

the Institute for Legislative Reform at the U.S. Chamber of Commerce⁵—echoed that position. Some parties defended criminal enforcement of the Lacey Act by maintaining that it is necessary to protect domestic industries, while others defended criminal enforcement as necessary to halt illegal logging and protect the environment. The Heritage Foundation already responded to those criticisms in several recent papers.⁶

Still other witnesses defended the Lacey Act by arguing that it is an important, century-old law (which is interesting but irrelevant to whether criminal enforcement is necessary); or that it had and has bipartisan support (which just means that both parties got it wrong); or that George W. Bush's Administration supported criminal prosecution (which just means that his opponents finally found something that they like about him); or that it is necessary to prevent illegally harvested wood from entering the United States (which ignores the civil remedies, including forfeiture, that can be invoked at the border); or that it is the world's only criminal statute outlawing illegal logging overseas (which just means that we are imposing our norms on foreign nations that disagree with us or don't care); or that a goodly

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number of organizations support the Lacey Act (which just means that, shockingly,⁷ members of interest groups seeking economic rents or professing undying environmental love each have banded together once again); or that lots of musicians support the Lacey Act (does one really need to say anything?).

What was most interesting about yesterday's hearing, however, was what critics of the FOCUS Act did *not* say:

- No critic argued that Abner Schoenwetter⁸ and people like him should be sent to prison for “heinous” crimes such as importing lobsters into the United States that, under a void Honduran law, were too small to be taken and that should have been packed in boxes rather than in clear plastic bags.
- No critic argued that the Lacey Act does not apply to the violation of any and every law of any and every foreign nation.
- No critic argued that it is reasonable—to say nothing of desirable—to send people to jail for violating a foreign law that they did not know even existed.
- No critic argued that the Lacey Act cannot be criminally enforced in this matter.
- No critic—I’m referring specifically now to the federal government’s witnesses—foreswore prosecuting individuals for such a crime.
- And no critic of the FOCUS Act was willing to say the following:
 - “Yes, it is grossly unfair to send someone to prison in these circumstances:
 - “For unwittingly violating any law of any foreign nation when importing flora or fauna from overseas;
 - “Whether that law is a statute, a regulation, an interpretation
- of a regulation (official or not), or something else without any counterpart in our country;
- “However unrelated to conservation or the environment that law may be;
- “However trivial that law may be;
- “However difficult to find that law it may be;
- “Whatever the language in which that law is written may be;
- “Even though the very nation whose laws were allegedly violated has no interest in enforcing its own laws;
- “Even though that nation may not give a fig about the environment as long as the locals get paid to ravage their own lands; and

1. See THE HERITAGE FOUNDATION, THE FOUNDRY, OVERCRIMINALIZATION, available at <http://blog.heritage.org/tag/overcriminalization/> (last viewed May 9, 2012).

2. HEARING ON H.R. 3210 & H.R. 4171 BEFORE THE SUBCOM. ON FISHERIES, WILDLIFE, OCEANS AND CONSULAR AFFAIRS OF THE HOUSE COMMITTEE ON NATURAL RESOURCES, 112th Cong., 2d Sess. (2012) (hereafter HOUSE HEARING), available at <http://naturalresources.house.gov/Calendar/EventSingle.aspx?EventID=293478> (last viewed May 8, 2012).

3. HOUSE HEARING, *supra* note 2 (testimony of Sen. Rand Paul), available at <http://naturalresources.house.gov/UploadedFiles/PaulTestimony05.08.12.pdf> (last viewed May 8, 2012).

4. HOUSE HEARING, *supra* note 2 (testimony of Rep. Paul Broun), available at <http://naturalresources.house.gov/UploadedFiles/BrounTestimony05.08.12.pdf> (last viewed May 8, 2012).

5. HOUSE HEARING, *supra* note 2 (testimony of Reid Rubenstein of the Institute for Legislative Reform at the U.S. Chamber of Commerce), available at <http://naturalresources.house.gov/UploadedFiles/RubinsteinTestimony05.08.12.pdf> (last viewed May 8, 2012).

6. See, e.g., Paul J. Larkin, Jr., “The FOCUS Act and Environmentalism,” THE HERITAGE FOUNDATION, LEGAL MEMORANDUM No. 80 (May 8, 2012), available at <http://www.heritage.org/research/reports/2012/05/the-focus-act-and-environmentalism>; Paul J. Larkin, Jr., “The FOCUS Act and Federal Law Enforcement,” Heritage Foundation, ISSUE BRIEF No. 3592 (May 7, 2012), available at <http://www.heritage.org/research/reports/2012/05/focus-act-overcriminalization-and-federal-law-enforcement>; Joe Luppino-Esposito & Paul J. Larkin, Jr., “Members of Congress Work to Rein in Overcriminalization in America,” Heritage Foundation, THE FOUNDRY (May 2, 2012), available at <http://blog.heritage.org/2012/05/02/time-to-focus-on-overcriminalization-in-america/>; Paul J. Larkin, Jr., “Defanging the Lacey Act: The Freedom from Over-Criminalization and Unjust Seizures Act of 2012,” Heritage Foundation, LEGAL MEMORANDUM No. 78 (Mar. 16, 2012), available at <http://www.heritage.org/research/reports/2012/03/defanging-the-lacey-act-the-freedom-from-over-criminalization-and-unjust-seizures-act-of-2012>.

7. *Casablanca* (Warner Bros. 1942), available at http://www.youtube.com/watch?v=SjbPi00k_ME (last viewed May 9, 2012).

8. See Heritage Foundation, *Excessive Criminal Laws Trap Honest American Businessman*, YouTube (Aug. 8, 2011), http://www.youtube.com/watch?v=pHvJ6ld_Mic&noredirect=1.

- “Even though an offender can be sentenced to, let’s say, 10,000 years, a one-year sentence for every fish or flower negligently hauled in and imported by a commercial boat.

“Yes, that is grossly unfair, but we want that done anyway because (check the appropriate box):

- “We are environmentalists and believe that trees in Guyana are more important than people’s lives in the United States, and we believe this even if the laws in Guyana really don’t protect trees.
or

- “We are a domestic timber or wood products industry desperately in need of protection against cheap foreign imports.
or

- “We are the government and never prosecute blameless individuals.
or

- “All or some combination of the above.”

That statement would have had the advantage of at least being honest and forthright. As it was, no one was willing to admit that what is at stake is whether morally blameless

individuals deserve to be arrested, prosecuted, and imprisoned in this country for actions committed in a foreign country allegedly in violation of a foreign country’s laws that the foreign country itself will not enforce. No one would make that admission because the public—justifiably and correctly—would be outraged if it knew what could happen.

As I said at the beginning, sometimes what people don’t say is far more important, and far more incriminating, than what they do.

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